No. 82-1998

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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I.

We are in agreement with the more sober statements in respondents' brief (Br. i, 21, 37)[1] about what is at issue in this case: do respondents have a constitutional right to use Lafayette Park and the Mall as places in which to sleep overnight in tents, where the stated purpose of this activity is to demonstrate the plight of the homeless?[2] But at

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[1]"Br." refers to respondents' brief in this Court.

[2]Respondents sought permission from the National Park Service to erect 60 tents in Lafayette Park and the Mall, in order to allow 150 persons to sleep overnight in tents for a period of three months. Respondents say (Br. 2) that they "do not seek to use the park or the Mall for 'sleeping accommodations,' 'living acccommodations,' or 'camping purposes'." Instead, they say, their proposed activity is "sleeping outdoors [that is, in tents] in a highly visible public place [that is, in Lafayette Park and the Mall] * * * to convey the plight of homeless

numerous other points in their brief respondents engage in overblown and misleading characterizations of what is at stake. Respondents say their proposed sleep-in should be constitutionally protected because they are citizens "whose resources are more limited and whose expressive skills are less sophisticated" (Br. 24); consequently they "lack the resources and skills necessary to communicate their ideas through classic forms of verbal expression" (Br. 22). Being "disadvantaged," they cannot engage in "classic verbal speech" (Br. 28). They must therefore "express the poignancy of their plight with their bodies" (Br. 22). This thus becomes a case where "unorthodox forms of expression" (Br. 71) must be protected in order to allow "the disenfranchised to join in the national debate" (Br. 72), as against

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people in America" (Br. 21; see also *id.* at i, 37). We are happy to accept this description. But then one scours the dictionary in vain to discover why this does not constitute using the parks for "sleeping accommodations," "living accommodations," or "camping purposes." Indeed, the very purpose of respondents' proposed demonstration is to *live* in the parks to demonstrate that respondents have no other place to live.

The words we elided are: "in the dead of winter without amenities" (Br. 21). It is true that respondents' demonstration was planned for the winter months, but the constitutional relevance of this constantly repeated (see, *e.g.*, Br. i, 2, 21, 37, 49, 51, 57) seasonal thrust is obscure. Respondents cannot seriously be suggesting that the constitutional right to engage in expressive sleep in the parks can be limited to the "dead of winter." (Respondents themselves have indicated that they are prepared to conduct their demonstration in the spring rather than the winter. See Declaration of Harold Moss, Mar. 20, 1983 (filed in this Court as a supplement to respondents' opposition to petitioners' application for a stay).)

"Without amenities," we suppose, refers to the fact that respondents did not propose to install toilets, showers, or cooking facilities. This seems to us to leave the case exactly where both we and respondents started: respondents sought to use the parks for a prolonged stay during which they would spend the nights sleeping in tents. Most people would call this using the park for "sleeping accommodations," "living accommodations" or "camping purposes."

"[c]ritics of the First Amendment [who] are fond of charging that free speech is the exclusive province of the socially and economically comfortable" (Br. 28).

The unwary reader would conclude from all this that a severe and censorious government was busying itself here engaging in "widespread suppression" (Br. 72) of symbolic expression so as to make sure that "persons of limited verbal sophistication" will not be allowed to " 'speak' with their bodies in the public spaces of this nation" (Br. 33). But what happened in fact? Did the government force these demonstrators to make their point by using "classic verbal speech"? No. Respondents were allowed to conduct their demonstration exactly where they wished to—Lafayette Park and the Mall, revered areas at the heart of the city and the nation. They were allowed, as they wished, to remain around the clock. Symbols—signs, pictures, mime-shows, even "symbolic" tents—were all permitted. Respondents were quite free to express their plight with their bodies as well as with words: they could stay overnight, march or sit or lie down, stand in silent vigil, sing or chant. In addition, respondents—whose affidavits show that they are far from inarticulate—were also free to engage in all forms of "classic verbal expression." [3] The fact is that respondents' proposed demonstration was treated with a generosity that would be quite unheard of in most other societies. Respondents were allowed to do *everything* they wished to do except for one thing: to go into their tents and spend the nights asleep. This, they were told, is forbidden. And it is forbidden, not because the government seeks to suppress unorthodox forms of expression or reserve the First Amendment for the

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[3]The suggestion that "verbal expression" is First Amendment activity reserved for the use of the "socially and economically comfortable" would surely be greeted with considerable surprise by those—from Thomas Paine to Martin Luther King—whose lives and words have constituted the history of American civil rights and civil liberties.

comfortable classes, but because it would convert respondents' demonstration into an activity that has always and sensibly been considered unsuited to these parks: using them as "sleeping accommodations," "living accommodations," or for "camping purposes."

II.

Respondents say that the "act of sleeping outdoors" is "central" to an "accurate portrayal of the reality of homelessness" and is therefore "critical to the existence of an effective demonstration" (Br. 37-38). Why? We cannot accede to the factual premises underlying this *ipse dixit*.[4] Nor do we agree with the First Amendment theory on which it is based. Respondents seem to believe that whenever a person asserts that "acting out" an idea is the best way to communicate an idea, the "acting out" itself automatically becomes "speech," fully protected by the First Amendment unless regulation is justified by a compelling governmental interest. On this analysis, there is no distinction at all between "speech" and "conduct"; "expressive" eat-ins are "speech" if intended to protest hunger; "expressive" destruction of property becomes "speech" designed to communicate rage or contempt. Distinctions come into play only when one turns to the question whether there is a government interest justifying regulation. (The point is vividly dramatized on pages 53-54 of respondents' brief, where they appear to suggest that political assassinations and terror bombings are excluded from First Amendment protection *not* because they do not constitute "symbolic speech," but only because they stand no chance of

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[4] As is fully developed in our opening brief (at 20-26), our submission is that the actual act of sleeping is marginal to the expressive power of respondents' demonstration. Respondents were given enormous space for First Amendment activities; it defies belief to assert that their *communicative* activities were meaningfully hampered by the requirement that they sleep elsewhere.

"surviving the balancing test which is the second half of the First Amendment equation" (Br. 54).) But, as we fully explain in our opening brief (at 18-24), this Court's symbolic speech cases simply do not support such a radical revision of the text of the First Amendment, one that wholly dissolves the notion of "speech." And respondents persistently ignore the Court's explicit warning in *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968), rejecting the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

III.

Having eaten their cake, respondents purport to have it, too. Having dissolved all distinctions for purposes of determining when "conduct" constitutes "speech," they also flatten out all distinctions when one turns to the question of how to evaluate whether the government's interests are sufficient to justify regulation. It's all one: whether the government says you may not give a political talk in the park, or says you may not sleep in tents in the park, the identical requirement — a showing of a "compelling" governmental need (Br. 67) — immediately comes into operation (see Br. 36, 56, 73). In fact, the most striking aspect of respondents' brief in this Court is that its analysis of what justification must be shown for the regulation barring camping in the park (see Br. 67-74) could be used *in haec verba* for a case where the government simply prevented a person from demonstrating at all — the issue is reduced to the stark question whether "the government can ban speech" (Br. 89) in order to protect the parks.

Again, we believe that our opening brief (at 29-30) fully explains why such a flattened approach is inappropriate. It simply makes no sense to treat this case as if respondents had been actually prevented from speaking. It makes no sense to pretend that their entire demonstration has simply

been prohibited. It is not the law that all forms of conduct, no matter how marginally expressive, have identical weights in the First Amendment balance. It is conventional First Amendment analysis — not a "modification" of a "key constitutional standard" (Br. 72 n.40) — to take into account, in the balancing process, the actual impact of a government regulation on expression, on the ability to communicate.[5]

It is worth reiterating, in this connection, that the government is not seeking here to suppress or regulate expression at all. Whatever restriction on expression exists in this case is a marginal and incidental effect of a neutral regulation[6] justified by purposes that have nothing to do

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[5]There is no absolute First Amendment right to deliver a message in the precise manner claimed by a demonstrator to be most effective; a regulation that completely bars a demonstration is subject to more severe scrutiny than one that merely regulates its manner. See *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). "Time, place and manner" regulations are tested in part in terms of whether "alternative channels" of communication are left open. See, *e.g., United States v. Grace*, No. 81-1863 (Apr. 20, 1983), slip op. 5. Thus, this test explicitly contemplates that a government interest that might not justify a prohibition on speech might justify regulation of its "manner." Preserving the beauty and serenity of the Memorial-core parks is a substantial government interest — one that, we think, fully justifies the minimal restriction on expression that is entailed by the rule that you may not spend the night asleep in these parks. It is a different question whether that same interest would justify a rule barring all demonstrations in these areas. To treat the two questions as identical is not good sense, nor good law.

[6]Respondents assert (Br. 17-18) that the Park Service has in other cases permitted expressive sleeping. This factual assertion was emphatically rejected by the district court (Pet. App. 97a-98a, 106a-108a; see also *id.* at 55a nn. 19 & 20 (opinion of Wilkey, J.)). Just as in this case, the Arab Women's Council demonstration permit was approved on the condition that the participants engage in a "wakeful vigil" and that they comply with the "no camping" regulations. See Exh. 3b to Plaintiffs' Summary Judgment memorandum. The Vietnam Veterans Against the War (VVAW) demonstration occurred before the existing regulations

with expression. Thus, respondents' assertion (Br. 56) that the government is "suppressing * * * expressive activity under the rubric of a ban on camping" is wholly unjustified if meant to imply that the longstanding ban against camping is a pretext for suppressing expression. See also Br. 70. A regulation directed at expression always presents a serious First Amendment question, as we noted in our opening brief (at 25 n.21).[7] But there is no conceivable basis for inferring an intent to suppress expression here, and thus no basis for the support that respondents seek to draw on this point from the government's brief (see Br. 52).

IV.

Respondents' remaining arguments were generally anticipated in our principal brief and require only brief comment.[8]

1. Respondents repeatedly suggest (Br. 63, 66-68) that it is the government's position that the regulation here need only satisfy a "rationality" test in order to withstand First Amendment challenge. The suggestion is false. Assuming that respondents' sleep-in is entitled to First Amendment protection, we argue (see Pet. Br. 31-33) that the "no camping" regulation prohibiting it is valid, not merely because it is "rational," but because it is narrowly tailored to serve a significant government interest. We do contend, however,

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became effective, when the Park Service was still operating under the constraints of the decision in *CCNV I* and was required to allow "First Amendment camping." In any event, the district court expressly found that that case presented materially different factual circumstances. See Pet. App. 107a-108a.

[7]That, of course, is the teaching of the "nude dancing" cases relied on by respondents (see Br. 43-44, 48-49).

[8]Respondents' contention (Br. 90-93) that the regulations do not prohibit their proposed conduct is fanciful. This contention was correctly and unequivocally rejected by the district court (Pet. App. 101a-102a) and by all 11 judges on the court of appeals (see *id.* at 11a-12a (opinion of Mikva, J.); *id.* at 50a-53a (opinion of Wilkey, J.)).

that the First Amendment does not require invalidation of the regulation simply because it is possible for a court to draft a slightly different regulation, one that would carve out an exception for respondents but still serve the relevant government interests, albeit not as well.

2. Respondents' contention (Br. 83-89) that application of the regulation here serves no substantial government interest is without substance. As noted in our opening brief (at 16, 35-36, 38-39), it cannot seriously be disputed that the Memorial-core area parks are unsuitable for camping, and that the regulation — including its constituent prohibition against spending the nights asleep in tents — is well adapted to preserve park resources. Respondents argue that the regulation need not prohibit sleeping in the parks, because they will refrain from "abusive activity" harmful to the parks (Br. 89). But the First Amendment does not disable the government from regulating conduct that creates a substantial risk of harm. The regulation proceeds on the theory that continuous and intense use of a place — what is commonly called "living" there — constitutes a serious threat to the parks and will place a major strain on the resources available to protect them. Given the minimal impact of the rule on speech interests, this eminently sensible judgment should not be invalidated. See *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. at 654.

3. Respondents urge that the regulation is unconstitutionally broad because it does not make an exception for "expressive" sleep (Br. 74-76).[9] They acknowledge that such

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[9]Respondents' argument (Br. 57-59) that cases such as *Brown* v. *Louisiana*, 383 U.S. 131 (1966), and *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), support their position in this case is mistaken. In both cases vaguely worded ("breach of the peace") statutes were stretched to impose criminal punishment on peaceful and otherwise lawful First Amendment activity engaged in for obviously expressive purposes. The Court held that application of these broadly worded statutes to punish such conduct violated the Constitution. The cases thus stand for the

an exception cannot be created for them alone; the question is whether the government interest in preservation of the parks can be met even if they and others "similarly situated" are allowed to sleep there (Br. 75). Respondents say, without explanation, that there are "few, if any" others similarly situated (Br. 76). But they do not in any way specify criteria for determining who is to be deemed "similarly situated." Is the right to sleep in the parks to be limited to those whose message has a sufficiently strong substantive connection to sleep (such as homelessness) (see Br. 47-49)? Such a rule, rejected by the plurality below (Pet. App. 18a), would involve the Park Service in an ongoing monitoring of the content of the "speech" proposed by particular demonstrators; it would raise extremely serious First Amendment problems. What, then, is the alternative? The government does not, of course, contend that "every member of the general public" will have to be permitted to sleep in Lafayette Park and the Mall (cf. Br. 76). We do submit that, given the attraction of the Memorial-core as a site for vigils and demonstrations, allowing camping in the parks by all demonstrators who claim that an around-the-clock presence is important to conveying their message would create a

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proposition that the state may not single out otherwise lawful conduct for punishment because of its expressive content. See *Brown*, 383 U.S. at 142 (plurality opinion); *Edwards*, 372 U.S. at 237. This case presents the exact converse situation: the state has prohibited specific conduct through a general valid prohibition, and respondents claim that their engaging in it must be singled out for an exception because their purpose is allegedly expressive. It's as if, in *Brown*, one of the petitioners had in fact engaged in violence, and then argued that application of the breach of the peace statute was invalid because the purpose of the violence was to convey a message. No case decided by this Court, including the civil rights demonstration cases, suggests that a valid regulation that prohibits conduct for important reasons wholly unrelated to free expression becomes unconstitutional "as applied" as soon as an individual desires to engage in that conduct in order to convey a message. See *Brown*, 383 U.S. at 150 (White, J., concurring).

substantial threat to the resources of the parks and a serious interference with the rights of others who have an equal claim to their use.[10]

4. The fundamental problem with respondents' submission is that they are wholly unable to formulate a general rule or principle that would enable the National Park Service to determine who should and who should not be permitted to engage in expressive sleeping in the park. They are content to argue that their sleep-in is "speech," without explaining how the Park Service should deal with similar claims by other groups. On this approach — as under the opinions of the court of appeals — the government is reduced to treating each proposed demonstration on an *ad hoc* basis. One can, of course, readily deduce that, in the absence of a valid general rule, every time a permit to engage in expressive sleeping is denied, litigation will ensue. The result will be that the regulation of demonstrations in the Memorial-core parks will have been taken over by the *courts*, who will assume the responsibility to determine —on the basis of criteria that, so far at least, continue to be

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[10]We noted in our opening brief (at 36-38) that it would not be difficult for anyone to construct a facially valid First Amendment justification for camping. And we continue to believe that it would be inappropriate and outside its proper function for the Park Service to inquire into the motives of applicants for demonstration permits. Respondents reply (Br. 80-81) that, in certain circumstances, the government does have to inquire into the sincerity of beliefs. But the fact that such an inquiry may in some cases be required by an Act of Congress or to avoid a "substantial infringement of" freedom of religion (*Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963)) does not show that it is desirable or appropriate in the context of administering a system of demonstration licenses, much less that it is constitutionally required.

ineffable — when a proposed sleep-in is sufficiently "expressive" to warrant an exception to the no-camping regulation.[11].

We do not think that the purposes of the First Amendment would be substantially furthered by the creation of such a regime. *Ad hoc* discretionary licensing endangers the First Amendment when administered by the courts as well as when administered by the Executive Branch. We believe that the sounder approach is to allow the National Park Service, which has been entrusted with the duty to manage and preserve the Nation's parks, to apply its neutral and general rule against using the parks for sleeping accommodations — a rule that has only a trivial impact on the right of the people to communicate and that serves to protect important public interests in the preservation of these parks for their multifarious uses.

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[11]Judge Mikva's opinion below explicitly foreshadows this development (Pet. App. 29a-30a) (footnote omitted):

> Finally, the Park Service cannot mechanically apply its regulations to requests from groups seeking to exercise first amendment rights through sleeping. Although the government can and must retain a "content-neutral" obliviousness to the kind of message which a particular group seeks to express through sleeping, the Park Service cannot be oblivious to the implications of the first amendment — or the attendant complications. Each distinction and each line the Park Service draws in such applications must bear close scrutiny to ensure that symmetry of management does not crowd out first amendment claims.
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> We doubt that this will be the last occasion that this court will have to undertake the difficult reconciliation of first amendment activities with the necessity for order and management in the Mall and Lafayette Park. In a pluralistic society boasting of its free expression, we can expect no less.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

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